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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SETH D. HARRIS, Acting Secretary of the United States Department of Labor, Plaintiff, vs. GREATBANC TRUST COMPANY, et al., Defendants.	Case No. 5:12-cv-01648-R (DTBx) **DEFENDANT GREATBANC TRUST COMPANY'S OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE DEFENDANT GREATBANC'S AFFIRMATIVE DEFENSES** Hearing Date: March 4, 2013 Time: 10:00 a.m. Judge: Hon. Manuel L. Real Courtroom: 8

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I. INTRODUCTION

Plaintiff United States Department of Labor Acting Secretary Seth D. Harris' (the "Secretary") Motion to Strike Defendant GreatBanc Trust Company's ("GreatBanc") Affirmative Defenses ("Motion") should be denied. GreatBanc's *three* affirmative defenses, as currently pled, provide Secretary with the requisite fair notice under Federal Rule of Civil Procedure 8(c). The pleading requirement for affirmative defenses was not altered by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) or *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Both *Twombly* and *Iqbal* concerned the requirements for pleading claims under Federal Rule of Civil Procedure 8(a)(2). Neither dealt with or even mentioned pleading affirmative defenses under Federal Rule of Civil Procedure 8(c), which only requires a defendant to "affirmatively state" its defenses. Further, in at least *nine* cases the District Court for the Central District of California has declined to extend *Twombly* and *Iqbal* to affirmative defenses.

The Secretary's Motion amounts to no more than an exercise in futility and a waste of the court's and parties' time and resources. Each of GreatBanc's *three* affirmative defenses is appropriately pled. GreatBanc's First Affirmative Defense of Statute of Limitations meets the fair notice standard by including the specific statute of limitations upon which it relies. GreatBanc's Second Affirmative Defense of Failure to State a Claim is specifically allowed under Federal Rule of Civil Procedure 12(h)(2). Lastly, GreatBanc's Third Affirmative Defense of Additional Defenses merely reserves GreatBanc's right to amend its Answer under Federal Rule of Procedure 15—the defense is not an attempt to circumvent Rule 15's requirements.

The Secretary also has failed to show that he will suffer prejudice by the inclusion of GreatBanc's affirmative defenses. The Secretary makes vague references to "needless discovery" and "litigation of spurious issues" in his introduction. But the Secretary fails to discuss how GreatBanc's *three* affirmative defenses, including one defense of reservation of rights, could possibly cause the "needless discovery" or "litigation of spurious issues" of which the Secretary complains.

The court, accordingly, should deny the Secretary's Motion. In the event that the court grants the Secretary's motion in full or in part, GreatBanc respectfully requests the opportunity to amend its Answer.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(f) provides that a federal court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Courts disfavor motions to strike and generally do not grant them "unless it is clear that [the material sought to be stricken] can have no possible bearing upon the subject matter of the litigation. *Memory Control Enterprise, LLC v. Edmunds.com, Inc.*, CV 11-7658PA (JCx), 2012 U.S. Dist. LEXIS 31501, at *14 (C.D. Cal. Feb. 8, 2012).

The plaintiff has the burden of "convinc[ing] the court 'that there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances could the defense succeed.'" *S.E.C. v. Sands*, 902 F. Supp. 1149, 1165 (C.D. Cal. 1995). As such, courts often require the moving party to show prejudice. *Id.* at 1166; *see also* 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1381 (3d ed. 2004) ("Motions to strike a defense as insufficient are not favored . . . because of their somewhat dilatory and often harassing character. Thus, even when technically appropriate and well-founded, Rule 12(f) motions often are not granted in the absence of a showing of prejudice to the moving party."). The Ninth Circuit has found that prejudice can occur through allegations that "cause delay or confusion of the issues." *Sands*, 902 F. Supp. at 1166 (citing *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1528 (9th Cir. 1993), *rev'd on other grounds*, 127 L. Ed. 2d 455, 62 U.S.L.W. 4153, 114 S. Ct.

1023 (1994) (lengthy, stale, and previously litigated factual allegations could be properly stricken to streamline litigation)).

"The key to determining the sufficiency of pleading an affirmative defense is whether it gives the plaintiff fair notice of the defense." *Wyshak v. City Nat'l Bank*, 607 F.2d 824, 827 (9th Cir. 1979) (citations omitted). To meet the "fair notice" standard, a defendant must "state the nature and grounds for the affirmative defense." *Kohler v. Islands Restaurants, LP*, No 11-2260, 2012 U.S. Dist. LEXIS 24224, at **5 (S.D. Cal. Feb. 16, 2012). "It does not, however, require a detailed statement of facts." *Id.*

Should a court strike an affirmative defense, "leave to amend should be freely granted provided there is no prejudice to the moving party." *Kohler v. Bed, Bath & Beyond, LLC*, No. 11-4451, 2012 U.S. Dist. LEXIS 16048, at *2 (C.D. Cal. Feb. 8, 2012) (citing *Wyshak*, 607 F.2d 824, 826 (9th Cir. 1979)).

III. ARGUMENT

A. The Heightened Pleading Requirements Set Out in *Twombly* and *Iqbal* Do Not Apply to Affirmative Defenses

Despite the Secretary's assertion otherwise, Fed. R. Civ. P. 8 only requires that a defendant "affirmatively state" its defenses when responding to a complaint. Fed. R. Civ. P. 8(c)(1). Rule 8 does not require a defendant to provide detailed defenses or to state every fact supporting its defenses. *See Wyshak*, 607 F.2d at 827.

Neither *Twombly* nor *Iqbal* altered the pleading requirements for affirmative defenses. In *Twombly*, the Supreme Court considered what pleading threshold a plaintiff must clear when asserting claims under Fed. R. Civ. P. 8(a)(2). *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Rule 8(a)(2) requires "[a] short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Court held to show it is entitled to relief, a plaintiff must plead "enough fact to raise a reasonable expectation that discovery will reveal evidence" of the claim. *Twombly*, 550 U.S. at 556. *Iqbal* similarly analyzed Rule 8(a)(2). *Iqbal*, 129 S. Ct. at 1953.

No Circuit Court of Appeals, including the Ninth Circuit, has addressed whether *Twombly* and *Iqbal* should be extended to affirmative defenses. *Kohler v. Big 5 Corp.*, No. 2:12-cv-00500-JHN-SPx, 2012 U.S. Dist. LEXIS 62264, at *5-6 (C.D. Cal. Apr. 30, 2012). And Ninth Circuit district courts are split on the issue. *Id.* Most judges in this district, however, have declined to apply *Twombly* and *Iqbal* to affirmative defenses because of the textual differences between Rule 8(a) and Rule 8(c).[1] *Figueroa v. Islands Restaurants L.P.*, CV 12-00766-RGK (JCGx), 2012 U.S. Dist. LEXIS 89422, at *4 (C.D. Cal. June 22, 2012) (court refused to extend *Twombly* to affirmative defenses because *Twombly* was limited to Rule 8(a), which concerns "[a] pleading that states a claim for relief"); *Figueroa v. Baja Fresh Westlake Village, Inc.*, CV 12-769-GHK (SPx), 2012 U.S. Dist. LEXIS 90210, at *6 (C.D. Cal. May 24, 2012) (same); *Kohler*, 2012 U.S. Dist. LEXIS 62264, at *6 (same); *Figueroa v. Marshalls of CA, LLC*, No. CV11-06813-RGK (SPx), 2012 U.S. Dist. LEXIS 67990, at *3-4 (C.D. Cal. Apr. 23, 2012) (same); *Memory Control Enterprise, LLC*, 2012 U.S. Dist. LEXIS 31501, at *11-12 (same); *Enough for Everyone, Inc. v. Provo Craft & Novelty, Inc.*, No. SACV 11-1161-DOC (MLGx), 2012 U.S. Dist. LEXIS 6745, at *4 (C.D. Cal. Jan. 20, 2012) (same); *Baroness Small Estates, Inc. v. BJ's Rests., Inc.*, No. SACV 11-00468-JST (Ex), 2011 U.S. Dist. LEXIS 86917, at *8-9 (C.D. Cal. Aug. 5, 2011) (same); *Garber v. Mohammadi*, No. CV 10-7144-DDP (RNB), 2011 U.S. Dist. LEXIS 57190, at *10 (C.D. Cal. Jan. 19, 2011) (same).[2]

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[1] Plaintiff fails to mention the split in the Ninth Circuit district courts and notably fails to bring to the court's attention any of the *nine* Central District cases rejecting the application of *Twombly* and *Iqbal* to affirmative defenses that GreatBanc located in its research. Plaintiff's Memorandum in Support of Motion to Strike Defendant GreatBanc's Affirmative Defenses ("Mot.") at 4:22-6:10.

[2] And many judges in other district courts in the Ninth Circuit also have rejected the extension of heightened pleading requirements to affirmative defenses. *E.g.*, *Trustmark Ins. Co. v. C & K Mkt., Inc.*, No. 10-465, 2011 U.S. Dist. LEXIS 13448, at *1 (D. Or. Feb. 10, 2011) (using fair notice standard for affirmative defenses

In each of the nine instances where the application of *Twombly* and *Iqbal* to affirmative defenses has been rejected in this district, the court relied on the differences in language between Rule 8(a)(2) and Rule 8(c). For example, in *Memory Control Enterprise, LLC*, 2012 U.S. Dist. LEXIS 31501, the court stated:

> However, *Twombly* addressed only Rule 8(a)(2), which provides that "[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Likewise, in *Iqbal*, the Supreme Court reasoned that "[w]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but has not 'shown' - that the pleader is entitled to relief." *Iqbal*, 129 S. Ct. at 1950. In contrast to Rule 8(a), which governs claims, Rule 8(b), which governs defenses generally, provides that "in responding to a pleading, a party must . . . state in short and plain terms its defenses to each claim asserted against it." Fed. R. Civ. P. 8(b)(1)(A). Furthermore, Rule 8(c)(1), which governs affirmative defenses in particular, provides that "[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense." Rule 8(b) and Rule 8(c) contain no language that pleaders must "show" that they are

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because *Twombly* and *Iqbal* were limited to pleading claims for relief under Rule 8(a)); *J & J Sports Prod., Inc., v. Scace*, No. 10cv2496-WQH-CAB, 2011 U.S. Dist. LEXIS 60270, at *1-2 (S.D. Cal. May 27, 2011) (same); *Kohler*, 2012 U.S. Dist. LEXIS 24224, at *2 (declining to extend *Twombly* and *Iqbal* to affirmative defenses without further direction from higher court and because the Ninth Circuit Court of Appeals has continued to recognize the fair notice standard after *Twombly*).

> entitled to relief. *See Wells Fargo & Co. v. United States*, 750 F. Supp. 2d 1049, 1051 (D. Minn. 2010).

Id., at *12-13.

In addition, the court in *Memory Control Enterprise* noted that:

> [P]laintiffs and defendants are in much different positions. Typically, a plaintiff has months -- often years -- to investigate a claim before pleading that claim in federal court. By contrast, a defendant typically has 21 days to serve an answer. Fed. R. Civ. P. 12(a)(1)(A)(I). Whatever one thinks of *Iqbal* and *Twombly*, the "plausibility" requirement that they impose is more fairly imposed on plaintiffs who have years to investigate than on defendants who have 21 days.

Id., at *13-14.

In contrast, the only application of *Twombly* and *Iqbal* to affirmative defenses in this district was by the same judge in two cases and was without any analysis of the textual difference between Rule 8(a)(2) and Rule 8(c). *Gonzalez v. Heritage Pacific Financial, LLC*, No. 2:12-cv-01816-ODW (JCGx), 2012 U.S. Dist. LEXIS 112195, at *3-6 (C.D. Cal. Aug. 8, 2012) (acknowledging the split among district courts in the Ninth Circuit and applying a heightened pleading standard to affirmative defenses merely because *Twombly* and *Iqbal* dealt with Rule 8); *Gonzalez v. Preferred Freezer Servs., LBF, LLC*, No. CV 12-3467 ODW (FMO), 2012 U.S. Dist. LEXIS 93015, at *5-6 (C.D. Cal. July 5, 2012) (noting the split among Ninth Circuit district courts and extending *Twombly* and *Iqbal* to affirmative defenses without discussion of the differences between Rule 8(a)(2) and 8(c)).

The majority of the remaining cases on which the Secretary relies are from the Northern District of California, which, unlike the Central District, has uniformly adopted the application of *Twombly* and *Iqbal* to affirmative defenses. *Ear v. Empire Collection Authorities, Inc.*, No. 12-1695-SC, 2012 U.S. Dist. LEXIS 110906, at *3 (N.D. Cal. Aug. 7, 2012) (district courts in the Northern District of California "have uniformly, as far as [the court] can tell, adopted the plausibility standard"). The only other case relied upon by the Secretary for the extension of *Twombly* and *Iqbal* to affirmative defenses is *Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647 (D. Kan. 2009), a case from the District Court for the District of Kansas that acknowledges the difference in language between Rule 8(a)(2) and Rule 8(c)—"Rule 8(c) for affirmative defenses does not contain the same language as 8(a)(2)"—but still concludes with little analysis that *Twombly* should apply to affirmative defenses. *Id.* at 651-52.

Because of the differences in language between Rule 8(a)(2) and Rule 8(c), this court should apply the fair notice standard when assessing the sufficiency of GreatBanc's affirmative defenses.

B. GreatBanc's Affirmative Defenses Are Legally Sustainable

1. GreatBanc's First Affirmative Defense of Statute of Limitations Is Sufficiently Pled.

GreatBanc has met the fair notice standard for pleading a statute of limitations defense. To sufficiently plead a statute of limitations defense under the fair notice standard, a defendant need only cite to the applicable statute of limitations upon which it relies. *See Wyshak*, 607 F.2d at 827 (defendant's statute of limitations defense was sufficient where an "attached memorandum made specific mention of Cal. Code Civ. Proc. § 338.1 as the statute of limitations upon which [defendant] relied"); *Figueroa v. Marshalls of CA, LLC*, 2012 U.S. Dist. LEXIS 67990, at *3-4 (a specific statute must be identified to meet the fair notice standard for a statute of limitations defense); *Kohler v. Islands Restaurants, LP*, 2012 U.S. Dist. LEXIS 24224, at **18-19 (same). In its First Affirmative Defense, GreatBanc identified ERISA § 413 (29 U.S.C. § 1113) as the statute of limitations upon which it relied. GreatBanc's Answer at 36:20-24 (D.E. #21). The fair notice standard requires nothing more for pleading a statute of limitations defense.

Contrary to the Secretary's argument, GreatBanc's First Affirmative Defense does not fail as a matter of law. Under the legal standard for a motion to strike, the Secretary has the burden of showing that "no questions of fact or law that might allow the challenged defenses to succeed." *Sands*, 902 F. Supp. at 1165. The Secretary has not met his burden. Instead, he states in a conclusory fashion that *GreatBanc* "cannot plead specific facts" that could show that the Secretary has not met the applicable statute of limitations. Mot. at 7, n. 2. Further, the Secretary has not explained why under any set of facts the tolling agreement between the parties would bar a statute of limitations defense. *Id.* at 8:14-9:12. As such, GreatBanc's First Affirmative Defense should not be stricken.

2. GreatBanc's Second Affirmative Defense of Failure to State a Claim Is Sufficiently Pled.

The Secretary contends that GreatBanc's Second Affirmative Defense, which raises Plaintiff's failure to state a claim, should be stricken as "insufficient." The Secretary argues that GreatBanc's Second Affirmative Defense is not "proper," it lacks "sufficient detail," and that, regardless, the Secretary has satisfied his pleading requirements. The Secretary's arguments are without basis.

First, "[f]ailure to state a claim on which relief can be granted is an affirmative defense that may be raised in any pleading allowed or ordered under Rule 7(a), by motion, or at trial." Fed. R. Civ. P. 12(h)(2). *Doe v. Phoenix-Talent Sch. Dist. #4*, No. 10-3119-CL, 2011 U.S. Dist. LEXIS 16894, at *5 (D. Or. Feb. 18, 2011). Fed. R. Civ. P. 7(a)(2) expressly lists "answer to complaint" as a permissible pleading. Here, GreatBanc has set forth its Second Affirmative Defense in a "pleading" as it is entitled to do. There is no basis to dismiss the affirmative defense.

The Secretary further argues that GreatBanc's Second Affirmative Defense "is not pleaded with sufficient detail," relying on *Gonzalez v. Heritage Pacific Financial, LLC*, No. 2:12-cv-01816-ODW (JCGx), 2012 U.S. Dist. LEXIS 112195, (C.D. Cal. Aug. 8, 2012). Here, the Secretary's position is that the heightened *Twombly* standard applies to the pleading of affirmative defense. *Id.*, at *1 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). But as discussed in detail above this position is hardly decided as a matter of law as "neither the Ninth Circuit nor any other Circuit Court of Appeal has held that *Twombly* and *Iqbal* govern the pleading standard for affirmative defenses." *Id.*, at *1; *see also J & J Sports Prods., Inc. v. Scace*, No. 10cv2496-WQH-CAB, 2011 U.S. Dist. LEXIS 60270, at *3 (S.D. Cal. May 27, 2011). Indeed, as discussed in Section III.A. above, on at least nine occasions courts in this district have declined to extend *Twombly* and *Iqbal* to affirmative defenses and instead applied the *Wyshak* fair notice standard. Not only has GreatBanc met the fair notice standard here, but the Secretary has failed to even argue why he would be prejudiced by the inclusion of GreatBanc's Second Affirmative Defense as is required on a motion to strike. As such, the inclusion of GreatBanc's Second Affirmative Defense is appropriate and should not be stricken.

Finally, the Secretary argues that, "in any event, the Secretary has plainly pleaded the elements necessary to state a claim for relief and facts sufficient to constitute claims under ERISA[.]" Mot. at 11. For purposes of Plaintiff's Motion, this issue is not before the Court. Any decision on whether the Secretary has "plainly pleaded the elements" of any of his claims is premature.

3. GreatBanc's Third Affirmative Defense of Reserving Additional Defenses Is Sufficiently Pled and Not Immaterial.

The Secretary argues that GreatBanc's Third Affirmative Defense, expressing a reservation of the right to assert further affirmative defenses, should be stricken as "improper." Mot. at 11-12. Here, the Secretary contends that GreatBanc seeks to "circumvent" Federal Rule of Civil Procedure 15 by asserting the right to assert further "unknown" defenses. *Id.* at 12. This is not the case. GreatBanc simply has highlighted its intent to continue to review and analyze the underlying facts of this matter and raise additional affirmative defenses if appropriate. For this reason, there is no basis to "strike" GreatBanc's reservation. Further, GreatBanc's obligations under the Fed. R. Civ. P. remain unchanged and the express reservation causes no prejudice to the Secretary. *See, e.g.*, *Kabushiki Kaisha Stone Corp. v. Affliction, Inc.*, No. C 09-2742, 2010 U.S. Dist. LEXIS 20504, at *9 (N.D. Cal. Mar. 8, 2010) (reservation of rights "'affirmative defense' does not give Affliction any additional rights nor relieve it from complying with Rule 15 should it seek to add affirmative defenses, but neither does presence of that language in the answer in any way prejudice or burden Stone.") (original emphasis). Accordingly, the Secretary's Motion to Strike GreatBanc's Third Affirmative Defense should be denied.

IV. CONCLUSION

For the reasons stated above, the Secretary's Motion should be denied. If the Court is inclined to grant the Secretary's Motion in whole or in part, GreatBanc respectfully requests leave to amend its Answer.

Dated: February 11, 2013 MORGAN, LEWIS & BOCKIUS LLP

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 11, 2013, the foregoing Defendant GreatBanc Trust Company's Answer and Affirmative Defenses was filed electronically. Notice of this filing will be sent to all parties listed below by operation of the Court's electronic system. Parties may access this filing through the Court's system.

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